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No. 98-1161

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

CITY OF ERIE,

Petitioner,

-v.-

PAP'S A.M.

Respondent.

ON WRIT OF CERTIORARI TO
THE PENNSYLVANIA SUPREME COURT

BRIEF OF *AMICUS CURIAE* NATIONAL FAMILY LEGAL FOUNDATION IN SUPPORT OF THE CITY OF ERIE

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37 pp

QUESTION PRESENTED

In *Barnes v. Glen Theatre*, this Court upheld Indiana's public indecency statute as applied to nude dancing in sexually oriented businesses. In a plurality decision, a majority of justices agreed that the statute's purpose was not the suppression of free expression. The City of Erie adopted an ordinance patterned after the Indiana statute. Pap's, a sexually oriented business seeking to offer nude dancing, alleges that the ordinance violates its free speech rights. Does *Barnes* govern?

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CONSENT OF THE PARTIES

Attorneys for Petitioner and Respondent have consented to the filing of an amicus curiae brief by National Family Legal Foundation. Copies of the written consents appear in Appendix A.

INTEREST OF THE *AMICUS CURIAE*[1]

National Family Legal Foundation (NFLF) is a nonprofit organization founded in 1990 to provide resources and legal counsel to help communities take effective, constitutional action against the harmful secondary effects of sexually oriented businesses. In serving the public interest, NFLF attorneys draft, review, and provide expert testimony on legislation at all levels of government.

NFLF advocates ordinances that help communities prevent the crime and public health problems that flow from

[1] Pursuant to Sup. Ct. Rule 37.6, counsel for *amicus curiae* National Family Legal Foundation discloses that he authored this brief in whole. Partial funding for the preparation and submission of this brief was provided by Alliance Defense Fund, Scottsdale, AZ.

sexually oriented businesses. Public nudity in sexually oriented businesses contributes to these harms. As Justice Rehnquist explained in *California v. LaRue*, "prostitution occurred in and around such licensed premises, and involved some of the female dancers. Indecent exposure to young girls, attempted rape, rape itself, and assaults on police officers took place on or immediately adjacent to such premises." 409 U.S. 109, 111 (1972). Unfortunately, the problems communities face with sexually oriented businesses are not a thing of the past. *See, e.g. DCR, Inc. v. Pierce County*, 92 Wash. App. 660 (1998) (documenting prostitution, narcotics transactions, and customers orally contacting dancers' genitalia). The spread of disease and threats to public health that attend public nude conduct are an ongoing concern for the local governments NFLF serves. The prohibition of public nudity in sexually oriented businesses furthers the government interest in preventing these harms. *Barnes v. Glen Theatre*, 501 U.S. 560, 584 (Souter, J., concurring).

NFLF contends that the time, place, and manner doctrine applied in *Barnes* has an important place in First Amendment jurisprudence. The doctrine allows governments to further their interests in protecting communities while allowing sometimes disfavored messages, including eroticism, to be conveyed. Absent this doctrine, the First Amendment would become meaningless, for persons engaging in a variety of illegal conduct would claim that they intended thereby to express an idea. *United States v. O'Brien*, 391 U.S. 367, 376. Such a result would make a mockery of our constitutional system.

NFLF urges this Court to reverse the court below because its conclusion undermines not only the well-being of our communities, but also the last thirty years of this Court's First Amendment jurisprudence.

SUMMARY OF THE ARGUMENT

In *Barnes v. Glen Theatre*, this Court upheld Indiana's public indecency statute as applied to nude dancing in sexually oriented businesses. In a plurality decision, a majority of Justices agreed that the statute's purpose was not the suppression of free expression and that the State's goal of protecting societal order and morality was a valid support for the law. Justice Souter, in his concurrence, recognized morality as a valid support for the law but required the State's proffered goal of preventing the negative secondary effects of nude dancing in order to uphold the regulation. Hence, under *United States v. Marks*, Justice Souter's position provided the "narrowest grounds" supporting the judgment, and became the holding of the case.

Three years after *Barnes*, the City of Erie adopted an ordinance substantively identical to the Indiana statute. In reviewing the ordinance, the Pennsylvania Supreme Court concluded that *Barnes* was "hopelessly fragmented" and offered no "binding precedent" that lower courts must follow.

The court then adopted positions rejected by this Court in *Barnes* and invalidated the Erie ordinance as applied to nude dancing in sexually oriented businesses. Because the Pennsylvania Supreme Court misapplied the *Marks* rule to circumvent this Court's binding precedent on a federal constitutional question, this Court should reverse.

ARGUMENT

I. THE LOWER COURT'S MISAPPLICATION OF THE *MARKS* RULE CIRCUMVENTS *BARNES* AND UNDERMINES OUR JUDICIAL STRUCTURE.

A. The *Barnes* Court held that Indiana's prohibition of public nudity is a valid regulation of conduct and that its incidental limitations on expression are justified by the government's interest in preventing the negative secondary effects that attend public nude conduct.

The lower court described this Court's decision in *Barnes v. Glen Theatre*[1] as "hopelessly fragmented,"[2] "non-harmonious,"[3] and a "hodgepodge,"[4] from which it was impossible to glean a holding. Thus it concluded, "[A]lthough we may find that the opinions expressed by the Justices prove instructive, no clear precedent arises out of Barnes..."[5] The lower court's problems with *Barnes*, however, are common to all true plurality opinions and reflect not a lack of understanding of how to handle the Erie

[1] *Barnes v. Glen Theatre*, 501 U.S. 560 (1991) (plurality opinion)
[2] *Pap's A.M. v. City of Erie*, 719 A.2d 273, 277 (Pa. 1998).
[3] *Id.*
[4] *Id.* at 278.

ordinance, but rather a lack of willingness to follow binding Supreme Court precedent with which they simply disagreed.[6] A review of the *Barnes* decision demonstrates that the Erie ordinance is a constitutional time, place, and manner regulation of expressive conduct.

The *Barnes* decision produced three opinions agreeing on the judgment: the plurality opinion authored by Chief Justice Rehnquist, in which Justices Kennedy and O'Connor joined, a concurring opinion filed by Justice Scalia, and a concurrence filed by Justice Souter. Each of the Justices supporting the judgment agreed that the Indiana statute could not be characterized as relating to the suppression of free expression, and that protection of societal order and morality is a valid government interest furthered by the law.

Justice Scalia took the broadest view, stating that as a general regulation of conduct, the statute did not implicate the First Amendment and therefore any rational basis would

[5] *Id.*
[6] *Id.* at 279 (opining instead that Justice White's dissenting opinion in *Barnes* was "directly applicable to the situation before us now...").

justify its application to the conduct at issue.[7] The plurality took a narrower view, opining that because the statute had an incidental impact on expressive conduct, the law was justified not by "any rational basis," but by the important government interest of protecting societal order and morality from the "gross and open indecency" of persons indiscriminately exposing their genitals in public places.[8] Justice Souter's position took an even narrower view, resting his concurrence in the judgment "not on the possible sufficiency of society's moral views to justify the limitations at issue, but on the State's substantial interest in combating the secondary effects of adult entertainment establishments of the sort typified by respondents' establishments."[9]

Each of the opinions agreed that the prohibition of public nudity was a regulation of conduct that could not be characterized as relating to the suppression of free expression. Justice Scalia noted that "On its face, this law is

[7] *Barnes*, 501 U.S. at 572 (Scalia, J., concurring).
[8] *Id.* at 568 (plurality opinion) (citing *Winters v. New York*, 33 U.S. 507 (1948))
[9] *Id.* at 582 (Souter, J., concurring).

not directed as expression in particular..."[10] The plurality echoed this conclusion when discussing the government's interest in protecting societal morality: "This interest is unrelated to the suppression of free expression."[11] And Justice Souter concurred, stating that "[T]he governmental interest in combating prostitution and other criminal activity is not at all inherently related to expression."[12] The agreement of the *Barnes* Court on this point alone precludes the lower court's conclusion that a public nudity law is a content-based restriction on speech deserving strict scrutiny.[13] For as the Third Circuit has explained, lower court courts "are bound by both the Supreme Court's choice of legal standard or test and by the result it reaches under that standard or test."[14] Justice Castille, concurring below on

[10] *Id.* at 572 (Scalia, J., concurring).
[11] *Id.* at 570 (plurality opinion).
[12] *Id.* at 585 (Souter, J., concurring).
[13] *Pap's*, 719 A.2d at 279.
[14] *Planned Parenthood v. Casey*, 947 F.2d 682, 694 (3rd Cir. 1991), *aff'd in part and rev'd in part*, 112 S.Ct. 2791 (1992).

state law grounds, recognized this obvious principle and exposed the error of the *Pap's* majority.[15]

Moreover, the five Justices agreed that protecting morality was a valid reason for the law. For Justice Scalia, morality supplied the rational basis for the law.[16] For the plurality, protecting morality was the substantial interest required under *United States v. O'Brien.*[17] And Justice Souter, while not agreeing that the interest in morality alone was *sufficient* to justify the law, agreed that protecting morality was a valid reason favoring its justification: "While it is certainly sound in such circumstances to infer general purposes "of protecting societal order and morality ... from [the statute's] text and history, I think that we need not so limit ourselves in identifying the justification for the legislation at issue..."[18] In sum, despite Pap's

[15] *Pap's*, 719 A.2d at 282 (Castille, J., concurring) ("[F]ive Justices, and thus a majority, voted to uphold the ordinance in Barnes on the basis that the ordinance at issue in Barnes could not be characterized as relating to the suppression of free expression for purposes of the First Amendment. Therefore, a five-Justice majority declined to apply the strict scrutiny test.")
[16] *Barnes*, 501 U.S. at 580 (Scalia, J., concurring)
[17] *Id.* at 569 (plurality opinion) (following *United States v. O'Brien*, 391 U.S. 367 (1968)).
[18] *Id.* at 582 (Souter, J., concurring).

characterization that moral motivations of the Erie City Council taint the constitutionality of the ordinance,[19] and Justice Castille's opinion of the same,[20] the protection of societal order and morality has empirically been a strong support for laws regulating public conduct.[21]

Despite the agreement of the majority of Justices on these two important points, the lower court incorrectly concluded that apart from the issue of the applicability of the First Amendment to the expressive conduct of nude dancing, there was "no point on which a majority of the Barnes Court agreed."[22] This conclusion stemmed from the court's improper focus on areas of divergence among the opinions supporting the judgment; it is clearly erroneous and should be reversed.

All five Justices agreed upon the major premise that the Indiana statute was directed at conduct, not expression.

[19] Trial Brief for Plaintiff at 2, *Pap's A.M. v. City of Erie*, Court of Common Pleas of Erie County, No. 1994-60059.
[20] *Pap's*, 719 A.2d at 284 (Castille, J., concurring)
[21] *See, e.g., Le Roy v. Sidley*, 1 Sid. 168, 82 Eng. Rep. 1036 (K. B. 1664) (considering public nudity an act *malum in se*); *Ardery v. State*, 56 Ind. 328 (1877).
[22] *Pap's*, 719 A.2d at 278.

They differed as to the minor premise, i.e., the impact of this finding. Justice Scalia concluded that such a finding meant that the law did not implicate the First Amendment at all.[23] The plurality concluded the First Amendment was implicated because Indiana's regulation of conduct had incidental limitations on expressive activity, but that the State's interest in protecting societal order and morality jjustified those incidental limitations.[24] Justice Souter agreed with the plurality as to the applicability of the First Amendment, but wrote separately to concur in the judgment based upon the State's substantial justification in preventing the documented, negative secondary effects of nude dance establishments.[25]

Justice Souter's holding that prevention of negative secondary effects justified the regulation is a coherent subset of principles upon which five Justices agreed. The fact that four of the five did not believe that such a justification *was necessary* to uphold the law does not alter the conclusion. Three opined that something less -- a broader interest in

[23] *Barnes*, 510 U.S. at 582 (Scalia, J., concurring) (citing *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990).
[24] *Id.* at 567. (plurality opinion)

societal order -- is enough to justify the statute. And one opined that because of the major premise on which all five agree, i.e., that the law is unrelated to the suppression of free expression, that the First Amendment was not involved and an even broader range of government interest -- any rational basis -- would justify the law. As the even more pronounced disagreement discussed in the *Marks* case makes clear, disagreement as to the minor premise in the syllogism does not prevent a holding from emerging from the case.

B. The *Marks* "narrowest grounds" rule was born out of *Memoirs v. Massachusetts*, a plurality opinion in which concurring justices disagreed as to the First Amendment's scope. The rule's application to this case is straightforward.

In the 1977 case of *United States v. Marks*,[26] the proper application of obscenity standards was in issue. The Court was asked to decide whether the defendant was entitled to a jury instruction based on the *Roth-Memoirs*[27] formulation of obscenity or was subject to the more

[25] *Id.* at 582 (Souter, J., concurring)
[26] *United States v. Marks*, 430 U.S. 188 (1977).
[27] *Roth v. United States*, 354 U.S. 476 (1957); *Memoirs v. Massachusetts*, 383 U.S. 413 (1966) (plurality opinion).

expansive *Miller*[28] definition of obscenity, which was announced after the conduct giving rise to Marks' prosecution occurred but before he went to trial. The substantive difference was that under the *Roth-Memoirs* formulation, the prosecution would have had to prove that the material in issue was "utterly without redeeming social value."[29] Under *Miller*, the prosecution needed only show that the material "taken as a whole lacks serious literary, artistic, political or scientific value."[30]

The District Court gave an instruction based upon the newer, easier-to-prosecute *Miller* standards, and the Sixth Circuit Court of Appeals affirmed,[31] noting that the *Roth-Memoirs* definition had never been approved by a plurality of more than three Justices at any one time.[32] Apparently, the

[28] *Miller v. California*, 413 U.S. 15 (1973).
[29] *Roth*, 354 U.S. at 489; *Memoirs*, 383 U.S. at 419 ("A book cannot be proscribed unless it is found to be *utterly* without redeeming social value.")
[30] *Miller*, 413 U.S. at 24.
[31] *United States v. Marks*, 520 F.2d 913 (6th Cir. 1975).
[32] *Id.* at 919, 920.

Sixth Circuit concluded from this fact that the *Memoirs* standard never became the law.[33]

This Court granted certiorari. In answering the question of which jury instruction Marks should have been given, the Court analyzed the precedential value of *Memoirs v. Massachusetts*,[34] a case stemming from a decision of the Massachusetts Supreme Judicial Court. The state high court had held that a book need *not* be "unqualifiedly worthless before it be deemed obscene."[35] This Court granted certiorari and six Justices voted to reverse the Massachusetts Supreme Judicial Court's decision. Three Justices rested the reversal on the ground that the lower court misinterpreted the social value criterion of the federal constitutional definition of obscenity.[36] One Justice concurred on the ground that only "hard-core pornography" may be suppressed, and that the book in question was did not qualify as "hard-core

[33] *Marks*, 430 U.S. at 192.
[34] *Id.* at 193-94.
[35] *Memoirs v. Massachusetts*, 206 N.E. 2d 403 (Mass. 1965).
[36] *Memoirs v. Massachusetts*, 383 U.S. 413, 419 (Brennan, J., concurring, joined by Warren, C.J., and Fortas, J.).

pornography."[37] And two Justices concurred on different grounds -- that the First Amendment protects even obscene speech.[38]

In deciding the precedential value of the *Memoirs* decision, this Court in *Marks* explained:

> When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds...."[39]

Even sharp disagreement among the Justices concerning the applicability of the First Amendment does not diminish the binding nature of the narrowest position supporting the judgment. It is the law:

> Three Justices joined in the controlling opinion in Memoirs. Two others, Mr. Justice Black and Mr. Justice Douglas, *concurred on broader grounds* in reversing the judgment below. 383 U.S., at 421, 424. They reiterated their well-known position that the First Amendment provides an absolute shield against governmental action aimed at suppressing obscenity.... The view of the Memoirs plurality therefore constituted the

[37] *Id.* at 421.
[38] *Id.* at 421 (Black, J. concurring); *Id.* at 424 (Douglas, J., concurring).
[39] *Marks*, 430 U.S. 188, 193 (citing *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)

> holding of the court and provided the governing standards.... Memoirs therefore was the law.[40]

Instead of characterizing Justices Black and Douglas as taking a "radically different route"[41] to support the judgment in *Memoirs*, the Court in *Marks* simply states that the two "concurred on broader grounds." Certainly the *Marks* Court would have characterized Justice Scalia's concurrence in *Barnes* as a concurrence on the broader grounds that not only secondary effects, but any rational basis would support the Indiana statute. Though his position is not the law, the lower court was bound to "count" Justice Scalia's vote in favor of the narrower position that Justice Souter took in requiring a secondary effects justification. And just as the Sixth Circuit in *Marks* was bound to follow this Court's interpretation of a federal constitutional principle in *Memoirs*, so the Pennsylvania Supreme Court was bound to follow this Court's decision in *Barnes* that a public indecency statute could be constitutionally applied to

[40] *Id.* at 194.
[41] *Pap's*, 719 A.2d at 277.

completely nude dancing in sexually oriented businesses. The lower court openly refused to do so, and should be reversed.

C. The *Marks* rule is jurisprudentially sound because it limits the reach of plurality decisions while ensuring that the law emerging from those opinions is followed by lower courts.

The *Marks* rule is designed to serve two important functions: (1) to limit the reach of plurality opinions by ensuring that only the narrowest grounds supporting the judgment become the law, and (2) to ensure that lower courts follow that law by providing a methodology for discerning the Court's holding.[42] Lower courts must follow the binding precedents of higher courts, or the courts themselves will lose credibility and be incrementally stripped of their ability to preserve constitutional freedoms. The case sub judice reflects a direct assault on the Supreme Court as the institution that is tasked with authoritatively applying and interpreting the Constitution.

[42] Mark Alan Thurmon, Note, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 Duke L.J. 419, 421 (1992).

The Pennsylvania Supreme Court rejected the *Barnes* decision as binding precedent not because Justice Souter's failed to provide the narrowest grounds for the judgment, but rather because, in their view, "The fifth vote for Justice Souter's position is not forthcoming. It cannot be provided by Justice Scalia, who believed that restrictions on dancing are not to be analyzed pursuant to the First Amendment."[43]

The lower court misunderstands the *Marks* rule. *Marks* does not require that the narrowest grounds receive five votes in its favor. If it did, the second, third, and fourth votes for Justice Souter's position would also not be forthcoming, as the Chief Justice, Justice Kennedy, and Justice O'Connor did not agree that a secondary effects justification was necessary to uphold the content-neutral statute in *Barnes*. In fact, the lower court fails to recognize even the agreement between Justice Souter and the plurality, but instead states, "Even if we were to assume arguendo that [Justice Souter's] concurring opinion provided an approach which was "narrower" than, and yet still encompassed by and

[43] *Pap's*, 719 A.2d at 278.

consistent with, the one take by the Chief Justice, such a concession would provide only four votes for Justice Souter's position."[44] As Justice Castille correctly explained, "I believe the majority herein strains to find discord in *Barnes* where none exists,"[45] noting that even Justice Scalia did "not think the plurality's conclusions differ greatly from [his] own."[46]

Instead, the rule assumes *that no single rationale explaining the result enjoys the assent of five Justices*, and that the holding is discerned by identifying the opinion "applicable to the fewest cases, in contrast to an opinion that takes a more absolutist position or suggests more general rules."[47] As the Third Circuit has explained, the "narrowest grounds" rule will "identify as authoritative the standard articulated by a Justice or Justices that would uphold the fewest laws as constitutional" or "that ... would invalidate

[44] *Id.*
[45] *Id.* at 282.
[46] *Barnes*, 501 U.S. at 579.
[47] Linda Novak, Note, *The Precedential Value of Supreme Court Plurality Opinions*, 80 Colum. L. Rev. 756, 763.

the fewest laws as unconstitutional."[48] The authoritative standard in *Barnes* must of necessity be Justice Souter's concurrence, because only his rationale would produce results with which a majority of the Court would agree:

> Where no single rationale 'enjoys the assent of five Justices,' the situation becomes more complex, but the controlling principle is the same. Where a Justice or Justices concurring in the judgment in such a case articulates a legal standard which, when applied, will necessarily produce results with which a majority of the Court from that case would agree, that standard is the law of the land.[49]

Justice Souter's position is the holding of *Barnes*, for fewer regulations of expressive conduct will survive scrutiny under his opinion that would regulations analyzed under the reasoning adopted by the plurality or Justice Scalia. And in those cases, the narrower scrutiny of Justice Souter will produce results with which a majority of the Court from *Barnes* would agree.

Essentially the lower court posits that it is not bound by *Barnes* when interpreting this federal constitutional

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[48] *Planned Parenthood of Southeastern Pa. v. Casey*, 947 F.2d 682, 694 (3rd Cir. 1991), *aff'd in part and rev'd in part*, 112 S.Ct. 2791 (1992).
[49] *Id.* at 693.

principle because it is a plurality decision, which by definition includes disagreement among the various members controlling the judgment of the court. And instead of adopting any one of the three opinions supporting the judgment, the lower court decided to adopt the reasoning expressly rejected by this Court in *Barnes*.

D. Lower courts have consistently and correctly used the *Marks* rule to determine the *Barnes* holding, thereby providing predictability in the law. The "striking similarity" of the Erie ordinance to the law in *Barnes* should have ended the inquiry.

Predictability in the law helps citizens to order their conduct in accord with just laws and instructs governments to abide by the limits that the Constitution places on their authority. The *Marks* rule reflects this bedrock principle guiding the function of the judiciary:

> The principal objective of this *Marks* rule is to promote predictability in the law by ensuring lower court adherence to Supreme Court precedent. This objective requires that, whenever possible, there be a single legal standard for the lower courts to apply in similar cases and that this standard, when properly applied, produce results with which a

> majority of the Justices in the case articulating the standard would agree....[50]

A single legal standard is required to obtain predictability in the law, and since 1991, the *Marks* rule has provided that predictability in the context of public nudity laws. After stating that the plurality's views in *Memoirs* provided the governing standards for obscenity, the Court in *Marks* thought it important to observe that lower courts had consistently applied the obscenity standards of the *Memoirs* plurality: "Indeed, every Court of Appeals that considered the question between *Memoirs* and *Miller* so read our decisions."[51] Likewise, in the matter sub judice, the Circuit Courts of Appeal have consistently applied Justice Souter's rationale to similar laws since *Barnes* was handed down in 1991.[52]

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[50] *Planned Parenthood*, 947 F.2d at 693.
[51] *Marks*, 430 U.S. at 194.
[52] *See DiMa Corp. v. Town of Hallie*, 1999 U.S. App. LEXIS 17680, *15 (7th Cir. July 26, 1999); *Déjà Vu v. Metro Gov't (In re Tennessee Pub. Indecency Statute)*, 1999 U.S. App. LEXIS 535 (6th Cir. Jan. 13, 1999); *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 408 (6th Cir. 1997); *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 134 (6th Cir. 1994); *Farkas v. Miller*, 151 F.3d 900, 904 (8th Cir. 1998); *J & B Entertainment v. City of Jackson*, 152 F.3d 362, 370 (5th Cir. 1998); *International Eateries of Am., Inc. v. Broward County*, 941 F.2d 1157, 1160-61 (1991).

In *Triplett Grille v. City of Akron*, upon which Pap's heavily relies, the Sixth Circuit Court of Appeals concluded that Justice Souter's concurring opinion resolved the question before the Supreme Court on the narrowest grounds.[53] The Court of Appeals specifically observed that, "As a logical consequence of their approval of morality justifications" for the regulation, the plurality "implicitly agreed with Justice Souter that governmental efforts to control the harmful secondary effects associated with adult entertainment can serve as a basis" for restricting nude dancing.[54] Justice Scalia's position did not alter their conclusion.[55] This is most likely because, as a logical consequence of his opinion that any rational basis would justify the law, Justice Scalia implicitly agreed with Justice Souter that the government's interest in preventing harmful secondary effects associated with adult entertainment can serve as a basis for restricting nude dancing. Despite the differing rationales employed by the *Barnes* court, the Sixth Circuit agreed with the district

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[53] *Triplett*, 40 F.3d at 134.
[54] *Id.*
[55] *Id.*

court that "Justice Souter's opinion may properly be regarded as providing the proper framework" for evaluating Akron's regulation of nude dancing.[56] Three years later, the Sixth Circuit again looked to *Barnes*, reiterating the binding nature of the Souter opinion as precedent:

> [W]e do not have the freedom to pick and choose which premises and conclusions we will follow, but instead, with respect to a particular issue, must follow the reasoning of the concurring opinion with the narrowest line of reasoning on that issue.[57]

The lower court's picking and choosing of which premises to follow becomes even more egregious in light of the fact that the case at bar is substantively identical to *Barnes*. The line of reasoning in *Barnes* should have proved no difficulty for the lower court, which conceded that the Erie ordinance was "strikingly similar"[58] to the law upheld by this Court. "It should be noted that applications of the reasoning from a prior case are necessarily by analogy; if the facts do not materially differ, the prior result would govern and the reasoning used to reach that result would be

[56] *Id.* at 135.

irrelevant."[59] Lower courts faced with challenges to laws substantively identical to the Indiana public indecency statute have properly invoked *Barnes* to end the inquiry.

In *SBC Enterprises, Inc. v. South Burlington*, the federal district court for Vermont decided a challenge to the validity of a *Barnes*-type ordinance passed by the City of South Burlington. The court concluded that determining the constitutionality of the law was a simple task, holding that:

> Under Justice Souter's approach, the Ordinance is valid. Indeed, this Court need not engage in an analysis of the Ordinance beyond reference to Justice Souter's opinion. Because the regulations in the instant case and in Barnes are identical, there is little to add that would explain further why the Ordinance is valid. If anything, this case presents a regulation that is easier to uphold than that in Barnes, since the Resolution passed by the City Council indicates that it considered secondary effects.[60]

More recently, in *Farkas v. Miller*, the Eighth Circuit Court of Appeals reviewed an Iowa statute which required erotic dancers to wear G-strings and pasties during their

[57] *DLS*, 107 F.3d at 409.
[58] *Pap's*, 719 A.2d at 277.
[59] Thurmon, *When the Court Divides*, 42 Duke L.J. at 436.

performances.[61] Citing *Marks*, the Eighth Circuit concluded that Justice Souter presented the narrowest resolution of the issues in *Barnes*.[62] The threshold issue for the plaintiffs then, was whether their case could be distinguished from *Barnes*:

> The plaintiffs advance numerous arguments that seek to refute Justice Souter's reasoning and conclusions. Regardless of their strength or weakness, these arguments are unavailing, because we are not free to disregard Supreme Court precedent. We must apply the Barnes analysis as expounded by Justice Souter unless we find that this case is somehow distinguishable.[63]

The Eighth Circuit found that Iowa statute was not distinguishable from the law upheld in *Barnes* and disposed of the plaintiffs' arguments.[64] The court below should have done the same.

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[60] *SBC Enterprises v. City of South Burlington*, 892 F.Supp. 578 (D. Vt. 1995).
[61] *Farkas*, 151 F.3d 900
[62] *Id.* at 904.
[63] *Id.*
[64] *Id.* at 906.

CONCLUSION

The lower court defied binding Supreme Court precedent on a federal constitutional principle and should therefore be REVERSED.

Dated: August 12, 1999

Respectfully submitted,

SCOTT D. BERGTHOLD
Counsel of Record
National Family Legal Foundation
11000 N. Scottsdale Rd., Suite 144
Scottsdale, AZ 85254
(480) 922-9731

APPENDIX A

National Family Legal Foundation.

Protecting Children and their Neighborhoods

Board of Directors
Charles H. Dunlap III, NFLF Board Chairman
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President, Alliance Defense Fund

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Director of Employee Relations
Northern Pipeline Construction

Advisory Board
Marion "Mac" Magruder
President, Shannon-M, Inc.

Honorable Holland Coors
Former Ambassador
United Nation's Women's Conference

Staff
Scott D. Bergthold, Esq.
President and General Counsel

Joel R. Pearma
Community Services Manager

Guy Chadwick
Legal Conference Coordinator

Timothy Keller
Law Clerk

Amy Nesbitt
Executive Assistant

Leslie Webster
Administrative Assistant

Associate Legal Counsel
Sheila Green, Esq.
Lee L. Mueller, Esq.

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Web site www.nflf.com

Wednesday, June 16, 1999

Gregory Karle
Solicitor
City of Erie
626 State St., Room 505
Erie, PA 16501

Re: Pap's A.M. v. City of Erie, No. 98-1161

Dear Mr. Karle:

I serve as General Counsel for National Family Legal Foundation, a nonprofit legal organization which has assisted hundreds of municipalities in the drafting and defense of ordinances regulating sexually oriented businesses. We desire to file an amicus curiae brief in support of the City of Erie in the above-styled case. Pursuant to Rule 36 of the Supreme Court of the United States, I am seeking your written consent to our filing such a brief.

Please use the return Airborne Express envelope provided to let us know of your decision. Thank you for your prompt attention to this matter.

Sincerely,

Scott D. Bergthold

Scott D. Bergthold
General Counsel

Enclosures

I do __X__ do not ____ consent to the filing of an amicus curiae brief by National Family Legal Foundation in Pap's A.M. v. City of Erie, No. 98-1161.

_____ / Date 6-21-99
Gregory Karle
Solicitor, City of Erie

BEST AVAILABLE COPY

National Family Legal Foundation.

Protecting Children and their Neighborhoods

Board of Directors

Charles H. Dunlap III, NFLF Board Chairman
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President, Cavan Real Estate Investments

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Monday, June 28, 1999

Philip B. Friedman, Esquire
319 W. 8th St.
Erie, PA 16502

Re: Pap's A.M. v. City of Erie, No. 98-1161

Dear Mr. Friedman,

I serve as General Counsel for the National Family Legal Foundation. We desire to file an amicus curiae brief in support of the City of Erie in the above-styled case. Pursuant to Rule 37 of the Supreme Court of the United States, I am seeking your written consent to our filing such a brief.

Please use the return Airborne Express envelope provided to let us know of your decision. Thank you for your prompt attention to this matter.

Sincerely,

Scott D. Bergthold

Scott D. Bergthold
General Counsel

Enclosures

I do ✓ do not ___ consent to the filing of an amicus curiae brief by National Family Legal Foundation in Pap's A.M. v. City of Erie, No. 98-1161.

Date 6/29/99

Philip B. Friedman
Attorney

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing "Brief of Amicus Curiae National Family Legal Foundation in Support of the City of Erie" have been sent via common carrier for delivery on Friday, August 13, on this 12th day of August, 1999 to the following:

Gregory Karle
Solicitor
City of Erie
626 State Street, Room 505
Erie, PA 16501

Phillip B. Friedman, Esquire
319 W. 8th Street
Erie, PA 16502

Scott D. Bergthold

Scott D. Bergthold